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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the matter of	)	
	)	
GTE CORPORATION,	)	
Transferor,	)	CC Docket No. 98-184
	)	
and	)	
	)	
BELL ATLANTIC CORPORATION,	)	
Transferee.	)	
	)	
For Consent to Transfer of Control	)	

REPLY COMMENTS OF CTC COMMUNICATIONS, CORP.

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December 23, 1998

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SUMMARY

In these reply comments CTC responds to the initial comments of other parties and to issues which were raised in the Commission's *en banc* proceeding which addressed the proposed merger of GTE Corporation and Bell Atlantic Corporation. The Commission has a statutory obligation under Title III of the Communications Act of 1934 to consider the proposed merger under both the public interest standard of the Communications Act and under the provisions of the Clayton Act which are assigned by law to the Commission. The fact of concurrent consideration of the proposed merger by the Department of Justice under antitrust law does not in any way eliminate or reduce the Commission's obligation under its organic statute to address the public interest issues raised by the proposed merger.

The initial comments of parties favoring the proposed merger do not present reasoned analysis to the Commission. In the main they constitute nothing more than cheerleading and contribute little to the Commission's consideration of one of the largest telecommunications mergers in U.S. history. On the other hand numerous comments filed by CLECs opposing the merger converge in alleging that neither party to the merger has fulfilled its legal obligations under sec. 251 of the Communications Act of 1996. CTC's initial comments summarized its own difficulties securing its sec. 251 rights from Bell Atlantic. In the face of such serious and widespread objection from CLECs the Commission must carefully consider whether the proposed merger can be expected to create an entity which will faithfully fulfill its lawful obligations. Indeed, the convergence of unrelated CLECs in asserting that GTE and Bell Atlantic have each followed anti-competitive practices in violation of sec. 251 is striking. These CLEC objections fulfill the statutory criteria set forth in section 309(d) and (e) of the Communications Act for the showing

necessary to require an evidentiary hearing before the Commission can grant the merger applications.

The Commission's consideration of the GTE/Bell Atlantic merger should be based not on opposing comments or briefs but on a hearing record in which each party has the opportunity to submit detailed testimony and to challenge the testimony of other parties through discovery, cross examination, and proposed findings and conclusions. An expedited hearing schedule can be established so that the proceedings will not require longer than approximately four months. The hearing should be restricted to consideration of past facts or circumstances and need not address theoretical issues such as potential independent market entry. Such a hearing, which can determine whether GTE and Bell Atlantic have been dealing with CLECs as required by the law, is the only practical way to resolve disputed substantial and material questions of fact. In light of the central purpose of the Communications Act of 1996 to encourage competition, and the central role played by sec. 251 in implementing that purpose, it is critically important that the Commission have before it a full record concerning the extent to which the merger applicants have demonstrated their willingness to faithfully discharge their procompetitive obligations.

At the very least of the reply comments of GTE and Bell Atlantic contain as promised in the *en banc* proceeding, allegations of fact concerning GTE's and Bell Atlantic's prior adherence to the market-opening provisions of the law, other parties should be given an additional opportunity to respond to those submissions.

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REPLY COMMENTS OF CTC COMMUNICATIONS, CORP.

CTC Communications,Corp. ("CTC"), through undersigned counsel and pursuant to the Commission's *Public Notice* (dated October 8, 1998), submits these reply comments on the above-captioned application for authority to merge GTE Corporation into Bell Atlantic Corporation ("Application") and requests that the Commission initiate an accelerated hearing schedule to develop a full record in deciding whether the proposed merger is in the public interest.

CTC, which is certificated as a CLEC in New York and in the New England states, filed initial comments in this proceeding opposing the proposed merger on the grounds that it would be anti-competitive and contrary to the public interest. CTC contended that neither Bell Atlantic nor GTE, (collectively "the Applicants") has met its obligations under the Communications Act of 1996 (the "Act"), and specifically § 251 thereof.[1/] CTC demonstrated that both of these incumbent local exchange carriers ("ILECs") discriminate against competitive local exchange carriers ("CLECs") in an effort to discourage local competition and contended that after the proposed merger, such anti-competitive behavior will only intensify. CTC's initial comments emphasized that CTC has

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[1/] 47 U.S.C. § 151 *et seq.*

experienced systemic barriers and restrictions from Bell Atlantic in respect to the resale of Bell Atlantic's services. CTC noted that a number of state public service commissions have condemned Bell Atlantic's resale practices and directed it to adhere to § 251 of the Act.[2/] Finally, CTC noted that if, notwithstanding the applicants' history of noncompliance with law, the Commission decided to grant the Application, it should condition its approval on pre-merger, rather than post-merger, conditions.

On December 14, 1998, pursuant to a Public Notice, the Commission held an *en banc* proceeding to hear the views of a variety of industry representatives on the GTE/Bell Atlantic and other pending mergers, and to engage in limited questions and answers. In the course of that proceeding a representative of the CLEC industry and a spokesman for GTE and Bell Atlantic set forth contrary views about the extent to which GTE and Bell Atlantic have adhered to their respective obligations under section 251 of the Act. CTC addresses that conflict herein. CTC has also reviewed other initial comments filed on November 23, 1998 and responds briefly herein to those comments.

I. The Commission Has A Statutory Duty To Review The Merger Application And To Reach A Public Interest Judgment

At the *en banc* hearing on December 14, 1998, questions were raised concerning both the need for, and appropriate scope of, Commission review of the merger in light of the review being undertaken by the Department of Justice under the Hart-Scott-Rodino Antitrust Improvement Act.[3/] It is CTC's view that the Commission has an important independent role under the Clayton Act and

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[2/] See CTC initial comments at 12-13.

[3/] 15 U.S.C. § 18a.

the Communications Act to satisfy itself that the merger is not anti-competitive and will serve the public interest.

CTC believes the need for Commission review is both clear and beyond doubt. The case law, some of it going back more than 40 years, has firmly established in circumstances such as those presented here the Commission has an affirmative obligation to consider how the public interest would be affected by the merger and particularly with respect to competition and the antitrust laws. *See, e.g., FCC v. RCA Communications, Inc.*, 346 U.S. 86 at 92-95 (1953) (Commission's principal responsibility is to promote the public interest; competition is undoubtedly a relevant factor in that analysis); *U.S. v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*). However, it is the public interest standard embedded in the Communications Act, which is the fundamental issue for the FCC. *Cf. Seaboard Air Lines Co. v. U.S.*, 382 U.S. 154, 156-7 (1965) (ICC is obliged to consider public interest aspects of proposed railroad merger which prevails over any violation of the antitrust laws). As put by the U.S. Court of Appeals for the D.C. Circuit, "(t)he agency's determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry." *U.S. v. FCC, supra*, at 95 (quoting from *FCC v. RCA Communications, Inc.*)

In its recent approval of the merger of Bell Atlantic and NYNEX, *Applications of NYNEX Corp. and Bell Atlantic Corp.* ("*Bell Atlantic*"), 12 FCC Rcd 19985 (1997), the Commission noted that it has concurrent jurisdiction to review mergers under sections 7 and 11 of the Clayton Act, but declined to exercise such jurisdiction because it concluded that its jurisdiction under the Communications Act was sufficient to address and resolve the issues presented by the merger. Id. at 20005. However, the Commission noted that it "would not hesitate to exercise [its] Clayton Act authority, issue a complaint and initiate a hearing in the appropriate case." *Id.* In rejecting the

arguments of Bell Atlantic and NYNEX that the Commission lacked jurisdiction to consider the impact of their proposed merger on local competition, the Commission observed that the public interest analysis which it is bound to undertake "necessarily includes a review of the nature and extent of local competition, as exemplified by the fact that Section 271 of the Act specifically applies the public interest standard to, inter alia, a review of local market conditions." *Id.*, at 20007 (footnotes omitted). The Commission referred specifically to the new provisions in Title II of the Act, including those requiring incumbent local exchange carriers to offer competitors interconnection, to lease unbundled UNEs at reasonable and nondiscriminatory prices, to offer retail services at wholesale rates, and provide reciprocal compensation, provide collocation, and implement number portability and dialing parity. *See generally id.* at 20009-10. "In addition, we also consider the effect of the merger on the Commission's ability to constrain market power as competition develops, but before competition is itself sufficient to constrain market power." *Id.*, at 20009 (footnote omitted). The Commission also observed that "It is, however, precisely because such competition is just beginning at this time and uncertainties exist that care in evaluating the potential impact of mergers in evolving markets is crucial to ensuring the development of pro-competitive, deregulatory national telecommunications industry structure." *Id.* at 200012.

These are the criteria this Commission applied to the Bell Atlantic/NYNEX merger only last year, and there is no less justification to apply these same criteria to the present merger. In this connection it is noteworthy that after conducting a thorough analysis of the various pro-competitive obligations on incumbent LECs set forth in Title II of the Act, the Commission concluded that the proposed merger was a "close case" but could be approved with the imposition of detailed conditions and reporting requirements. A year and a half later, these considerations remain not only as relevant as before, but as crucial since progress in the development of competition both in GTE's and in Bell

Atlantic/NYNEX's operating territories has been modest, at best. Indeed, given the crucial importance of § 251 of the Act to the implementation of Congressional purpose, the compliance of the Applicants with that section is one of the "special considerations" referred to by the Court in *FCC v. RCA Communications, Inc.* Indeed, it is just this sort of informed analysis and predictive judgment for which the Commission was created. *Id. at* 96-97 (1953); *Bell Atlantic*, 12 FCC Rcd 19985 at 20011, 20041 and n. 99 (1997).

The Commission was correct to review the Bell Atlantic NYNEX merger under the Clayton and Communications Acts and it is obligated to do so here as well. Indeed, the legal compulsion to do so is *a fortiori* after approval and consummation of the prior merger. CTC urges the Commission to apply the standards of the *Bell Atlantic-NYNEX Merger Order* in this case as it examines the proposed transfer of control of GTE to Bell Atlantic. Given that neither of the applicants has truly cooperated with local competitors, as demonstrated in CTC's initial comments, the impact of the proposed merger upon prospects for local competition in the service territories of Bell Atlantic and GTE is highly relevant to the instant inquiry.

II. The Record As It Stands Contains Overwhelming Evidence That The Merger Applicants Are Not Obeying the Law

CTC has reviewed the initial comments of other participants in this docket. It is striking that comments filed by a wide spectrum of companies which have sought to enforce their rights as CLECs or potential CLECs under § 251 of the Act uniformly oppose the merger on public interest grounds. *See, e.g.,* Petition to Deny of AT&T Corp., pp. 12-18, Comments of the Competitive Telecommunications Association, pp. 14-15, Comments of Cablevision Lightpath, Inc., pp. 2-5. For its part, CTC noted in its initial comments that Bell Atlantic has been systematically denying CTC

its resale rights under § 251 of the Act.[4/] The only limited support for the merger comes from parties whose comments do not illuminate in any meaningful way the issues presented to the Commission. It is also striking that many of the contentions based on each company's individual experience attempting to enter the competitive fold, apart from minor differences, all tell the same story. Such corroborative reports must, as a matter of logic, be given high credence by the Commission.

This is the background against which the Commission must evaluate the proposed merger. CTC has no motive to oppose the merger of GTE and Bell Atlantic other than its deep concern, based on practical experience, that these entities are not currently discharging their legal obligations under section 251 of the Act, and accordingly are even less likely to do so post-merger when their economic dominance is even greater than it is today. Accordingly, if CTC's concerns can be met by the establishment and fulfillment of meaningful pre-merger conditions, CTC would have no further objection to the merger. These conditions, as set forth in CTC's initial comments, must be specific, incorporate significant financial penalties for non-compliance, and, most importantly, must require demonstrated compliance prior to the merger.

III. The Commission Should Hold An Evidentiary Hearing On Disputed Factual Matters

Given the *prima facie* showing in CTC's and others' initial comments that neither applicant has abided by its obligations in good faith, the Commission should inform itself, through the development of a full record, whether the proposed merger is in the public interest and whether the

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[4/] CTC initial Comments at 12-16.

merger will, in the words of the Clayton Act, "substantially... lessen competition, or ... tend to create a monopoly"[5/] in the provision of local exchange services.

Although the Commission undoubtedly enjoys substantial discretion in determining whether it is necessary to hold a hearing on a pending application, any analysis of the exercise of that discretion must begin with §§ 309(d) and (e) of the Act."[6/] These sections of the statute specify that if a substantial and material question of fact is presented or if the Commission for any reason is unable to make a public interest finding, it shall formally designate the application for a "full hearing" in which the parties in interest shall be permitted to participate. Parties opposing the application bear the burden of producing specific allegations of fact "sufficient to show that... a grant of the application would be prima facie inconsistent with subsection (a)... ."[7/] Protesting parties must also present to the Commission a "substantial and material" question of fact.[8/] In this case the Commission has been presented with specific allegations of unlawful conduct in pleadings filed by CTC, AT&T and others. As required by § 309(d), these allegations have been supported by sworn statements of individuals with personal knowledge of the matters alleged. In these circumstances a hearing is required. *Astroline Communications Co., Ltd. v. FCC*, 857 F.2d 1556, 1561-2 (D.C. Cir. 1988).

At the *en banc* hearing held by the Commission on December 14, 1998, representatives of the commenters opposing the GTE/Bell Atlantic merger and of the Applicants appeared and

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[5/] 15 U.S.C. §§ 18; 21(a).

[6/] 47 U.S.C. § 309(d) and (e).

[7/] 47 U.S.C. § 309(d)(1).

[8/] *Id.*, § 309(d)(2).

presented brief oral and written remarks. James Young, Executive Vice President and General Counsel of Bell Atlantic, advised the Commission that Bell Atlantic would supply a detailed written refutation of the CLECs' charges concerning non-compliance with § 251 in its reply comments. A CLEC representative responded to these denials by suggesting that the Commission hold an evidentiary hearing to test the conflicting views about the extent to which GTE and Bell Atlantic have implemented § 251 of the Act.

CTC endorses this request for such a hearing. Because the Commission has not provided initial commenters an opportunity to reply to the merger proponents' reply comments, contrary to the Commission's usual practice in contested adversarial matters, CTC and other CLECs have no opportunity to respond to the proponents' factual assertions in their reply comments. This procedure may well amount to an unlawful denial of the merger opponents' rights, but whether or not it is unlawful it clearly denies parties opposing the merger a fair opportunity to challenge GTE's and Bell Atlantic's denials. Moreover, the representations made by, *e.g.*, AT&T and CTC with respect to the lack of cooperation and good faith in GTE's and Bell Atlantic's § 251 activities, were necessarily highly condensed and foreshortened recitals of relevant prior events.

With an "excerpted" record before it which contains numerous, albeit only representative factual assertions from parties with opposing views, it will be virtually impossible for the Commission to sort out the claims and come to a rational conclusion about the prior behavior of GTE and Bell Atlantic without resorting to a systematic fact-finding process. CTC recognizes that evidentiary hearings can be time-consuming. However, the delay can be minimized by the establishment of an accelerated hearing process, with resort to pre-filed testimony and pre-hearing discovery. The presiding officer can be directed to tailor specific scheduling to an overall time budget. CTC suggests that a meaningful hearing record can be developed in 90 days and a

Recommended Decision can be required 30 or 45 days thereafter. Alternatively the Commission can have the record certified directly to it without awaiting a decision from the presiding Administrative Law Judge.

Whatever specifics the Commission adopts, an accelerated schedule of three or four months does not seem unreasonable to develop a full record on the important question of the prior competitive behavior of the Applicants especially in the context of one of the largest telecommunications mergers in U.S. history.[9/] The creation of a full record with the parties' respective assertions subjected to discovery and cross examination would go far to provide a responsible basis for the Commission to address the issues presented by the proposed merger. On the other hand, given the importance of this merger to the national economy, and its size and prominence, it would be a serious abnegation of the Commission's statutory responsibilities to forego the opportunity to build a full record.

Alternatively, if the Commission does not chose to establish an administrative hearing procedure, it should at a bare minimum permit any interested party to respond to the Applicants' Reply Comments to the extent those Comments contain factual material not previously presented to the Commission. CTC would much prefer the opportunity to test GTE's and Bell Atlantic's 251 compliance claims in the crucible of a live hearing, but at a minimum should have the opportunity to

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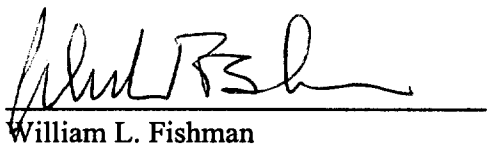
[9/] CTC does not propose the institution of a hearing to test differing positions on the question whether GTE and Bell Atlantic might have become direct competitors but for their agreement to merge. This issue, involving legal inferences and conclusions to be drawn from facts, is not appropriate for resolution in an evidentiary hearing. In contrast, the development of a hearing record on past events, *i.e.*, whether Bell Atlantic has been acting reasonably in its implementation of § 251 of the Act with respect to factual matters such as its behavior concerning interconnection, resale, or collocation negotiations and agreements, is eminently well suited for determination in an evidentiary proceeding. *See McCaw/AT&T*, 9 FCC Rcd 5836 at 5927-8 (1994), *affirmed*, *SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

respond on the record to any factual assertions made by GTE and Bell Atlantic for the first time in their Reply Comments.

Respectfully submitted,

CTC Communications, Corp.

By: 

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December 23, 1998

CERTIFICATE OF SERVICE

I, Sharon Gantt, hereby certify that on this 23rd day of December 1998, I served a copy of the Reply *Comments of CTC Communications Corp., CC Docket No. 98-184,* on the following parties listed below via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

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